IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 23, 2007 Session

STATE OF TENNESSEE v. CHARLES RANDOLPH PHELPS

Direct Appeal from the Criminal Court for Davidson County
No. 2006-A-868 Cheryl Blackburn, Judge

No. M2006-01909-CCA-R3-CD - Filed January 3, 2008

Pursuant to a plea agreement, the defendant, Charles Randolph Phelps, pled guilty to robbery and possession of less than .5 grams of cocaine for resale. He received sentences of six years for his robbery conviction and three years for his possession conviction to be served consecutively. On appeal, the defendant argues that the trial court erred by denying alternative sentencing and imposing continuous confinement. Following our review of the parties' briefs, the record, and applicable law, we hold that the trial court properly denied alternative sentencing and affirm the court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLin, J., delivered the opinion of the court, in which Joseph M. Tipton, P.J., and Robert W. Wedemeyer, J., joined.

Rayburn McGowan, Jr., Nashville, Tennessee, for the appellant, Charles Randolph Phelps.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and John Zimmerman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The defendant and a co-defendant were indicted for one count of aggravated robbery, one count of delivery of a controlled substance, one count of possession of cocaine for resale, one count of possession of marijuana for resale, one count of possession of alprazalam for resale, and one count of possession of drug paraphernalia. Pursuant to a plea bargain agreement, the defendant pled guilty to the lesser-included offenses of robbery and possession of less than .5 grams of cocaine for resale. He received sentences of six years for his robbery conviction and three years for his possession conviction to be served consecutively. The manner of service for the effective nine-year sentence was to be later determined by the trial court. At the guilty plea hearing, the state presented the following stipulated facts:

> If the State's witnesses were called to testify, they would testify that on December 9th, 2005, officers [used an informant to] set up a controlled purchase of drugs from the defendants in East Nashville. After some discussions with the defendants and the informant, arrangements were made to meet near a Krystal restaurant on Gallatin Road. The defendants entered the informant's car, robbed him at gunpoint, made off with the car and the purchase money that was to be used to purchase the drugs, as well as the drugs.
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> Officers attempted to stop them, but they ignored the officers' signals. [Co-defendant] was driving the motor vehicle. Sergeant Chestnut attempted to stop them, and he eluded Sergeant Chestnut and later wrecked the vehicle.

At the sentencing hearing, Detective Jeff Goodwin of the Metro Police Department testified that he used a confidential informant to set up the purchase of 100 ecstasy pills for $12 a piece. The informant contacted the defendant by phone and after several phone calls a meeting place was agreed upon. Detective Goodwin testified that he monitored the meeting visually and that he listened to the meeting via a transmitter worn by the informant. Detective Goodwin recalled that he heard "guns cocking" over the transmitter while the informant was counting the ecstasy pills. The defendant and co-defendant then robbed the informant of the "buy money," reclaimed the ecstasy pills, stole the informant's car, and fled the scene. According to Detective Goodwin, the co-defendant drove the informant's car and the defendant rode in the passenger side.

Detective Goodwin testified that he and other police officers gave chase and eventually arrested the defendant. At the time of the defendant's arrest, the police found some marijuana and cocaine in his pocket. He also had drug scales, and some ecstasy pills were found in the car. The defendant admitted that he got rid of some of the ecstasy pills by throwing them out the window. Detective Goodwin stated that the confidential informant was shaken by the robbery and thought his life was in jeopardy. On cross-examination, Detective Goodwin acknowledged that the defendant truthfully admitted his participation in the robbery. Detective Goodwin recalled that the defendant admitted he had one of the semi-automatic handguns brandished during the robbery. Detective Goodwin also recalled that the defendant was intoxicated at the time of the robbery.

Sergeant Mark Chestnut of the Metro Police Department testified that the robbery of the confidential informant was dangerous. Over the defendant's objection of relevance, the trial court permitted Sergeant Chestnut to testify about the number of drug-related homicides in Nashville. Sergeant Chestnut recounted that during homicide investigations, motivation for murder is usually determined and that information is recorded in police reports. Sergeant Chestnut admitted that he had only worked homicide cases dealing with "child abuse murders." However, Sergeant Chestnut asserted that he verified the drug-related homicide statistics by speaking with another sergeant, who was over the murder squad at the police department. According to Sergeant Chestnut, he was told by this other sergeant that murders were drug-related sixty to seventy percent of the time. At this time, the defendant through counsel lodged another objection, but it was overruled by the trial court.

Sergeant Chestnut testified that he had worked in the narcotics field for a year and a half. Relying on his overall experience in law enforcement, Sergeant Chestnut submitted that the narcotics unit was "a lot more dangerous environment" than the "physical and sexual abuse unit." Relying on various "com stat" and "field supervisor reports," Sergeant Chestnut stated that the crimes the defendant had been involved in "happen[ed] frequently in Davidson County." However, Sergeant Chestnut noted that he had only been involved in a couple hundred cases and the defendant's case was only the second case he participated in that involved a "robbery or car jacking." According to Sergeant Chestnut, the type of offenses the defendant committed jeopardized the safety of confidential informants. Sergeant Chestnut noted that "[i]f Metro Nashville Police Department had a pattern of getting informants harmed in any way, obviously the cooperation that we receive from the community would diminish greatly." Sergeant Chestnut then asserted that the loss of informants would harm the police department's investigative techniques. On cross-examination, Sergeant Chestnut clarified that ten to twenty percent of drug-related homicides were actually drug deals that had gone bad. He also admitted that he did not know whether or not the defendant intended to harm the confidential informant when robbing him.

Mrs. Pamela Phelps testified that she was the defendant's mother and that both she and her son had lived in Nashville their entire lives. Mrs. Phelps also noted that the defendant's father, step-father, and grandmothers were present to testify on the defendant's behalf. According to Mrs. Phelps, the defendant was a bright and intelligent young man. He was respectful, loving, caring, and easy to get a long with. Mrs. Phelps stated that her divorce from the defendant's father was hard on the defendant. She noted that the defendant had problems in the past with drug abuse, but she had never known the defendant to rob or assault anyone. As such, the news of the defendant's involvement in the present offenses came as a big shock to her and the family. Mrs. Phelps insisted that the defendant was not the type of person who would commit a homicide.

Mrs. Phelps testified that the defendant had the support of his family and that he had a place to stay should he be granted probation. Mrs. Phelps noted that the defendant had to pay some traffic tickets before he could get his driver's license. Mrs. Phelps stated that a few months ago the defendant became a father with the birth of his daughter. As a result, "[h]e now has a new focus in his life," and he wants to be productive in parenting his daughter. Mrs. Phelps believed that her son's participation in the robbery arose from his substance abuse, and she noted that the defendant "definitely needs rehabilitation when [it] comes to [his] drug use, also therapy and counseling." Mrs. Phelps recalled that in the past the defendant smoked marijuana, took ecstasy, and abused prescription drugs. As a juvenile, he was arrested for drug-related offenses and for possessing a prohibited weapon. He also had violated probation three or four times between 1999 and 2003. The defendant did not finish high school because he brought drugs to school and was expelled. Mrs. Phelps also acknowledged that the defendant had received treatment for his substance abuse in the past.

Mrs. Phelps identified several letters written on the defendant's behalf. She noted that one of the letters was from the defendant's former employer, who indicated his willingness to employ the defendant full-time subsequent to his release. Mrs. Phelps said that the defendant had a good work record, obtained his GED, and had taken steps to attend a technical college and get a HVAC certification to install heating and air systems. She noted that the defendant had expressed remorse and shame for his actions. On cross-examination, Mrs. Phelps acknowledged the defendant's criminal record and the fact that he was out on bond when he committed the present offenses.

The defendant testified that this was his first felony conviction and that he would be compliant with the terms of probation should he be granted probation. The defendant admitted that he had been on probation as a juvenile and was not successful. However, he asserted that he had successfully completed a probationary sentence as an adult for a prior misdemeanor weapon offense. The defendant also admitted that he had a drug problem, and had used ecstasy, marijuana, cocaine, and prescription drugs in the past. He said he wanted to get a handle on his substance abuse problem. He recounted that during his eight months in custody, he had completed the New Avenues Program, a drug treatment program offered to inmates through the Davidson County Sheriff's Department. He asserted that he would continue to participate in a treatment program regardless of any drug assessment recommendation.

The defendant admitted to his participation in the robbery and said he was remorseful for his conduct. He recalled that on the day of the robbery he had been drinking. He had also smoked marijuana and had taken Xanax pills. The defendant recounted that he did not consider the danger inherent with the robbery of the drug informant when he committed the offense. He confirmed that the gun he used to rob the informant was his gun. He noted that he did not attempt to run after being stopped by police. According to the defendant, the birth of his daughter had a big impact on him and he wanted to better his life. He was willing to work full-time and pursue vocational training at Miller-Motte Technical School. He was also on a waiting list for inpatient treatment at a drug rehabilitation program. On cross-examination, the defendant reiterated that he had violated his probation several times as a juvenile because he had not taken it seriously. He also acknowledged that he had been on bond from another drug offense at the time he was arrested for his current convictions.

At the conclusion of the sentencing hearing, the trial court denied alternative sentencing and ordered the defendant to serve his sentences in confinement. In ordering confinement, the court made the following findings:

> So what I'm really looking at is the considerations of 40-35-103 and 40-35-303. . . . [E]ven though [the defendant] might be considered eligible for an alternative sentence, it is his burden to convince the Court that a . . . total suspended sentence, is in society's best interest. It's his burden to prove. I have to consider whether confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct. That factor doesn't apply in this case. Though he has a long history, I don't think it's of such a nature that is contemplated by that statute.

> And the other that measures least restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. That one would apply.
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> But really, the important factor[s] that I need to consider in this case [are] whether confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit serious offenses. And there have been two cases that I need to refer with regard to that. The most recent one would be *State v. Trotter and Sheriff* . . . decided by the Supreme Court on June the 29th of this year where they make it clear by looking at the factor where depreciation of the seriousness of the offense is separate and apart from the deterrence factor. And the Court can deny probation on either one of those. . . .
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> So this would be what I'm going to find in this case. I find that confinement is absolutely necessary to avoid depreciating the seriousness of the offense. That is, this is a horrible situation. You have somebody who is working at the behest of the police department, and then you have police monitoring it and you hear the guns clicking, he's robbed, carjacked. And [the defendant] seems to think, well, he was drunk or whatever. Well, you know, that makes it even worse. Any movement of his finger on that trigger could have killed the informant, in which case we would be here in a totally different situation. That would be called felony murder. But those circumstances are particularly violent. They are reprehensible and they are offensive, and they are to an exaggerated degree. So just on depreciating the seriousness of the offense I would deny probation. But also in order to deter others from doing this - - I mean, it is clear that drug-related homicides are on the rise, that people who go to drug crimes are armed to the teeth because they've either been robbed themselves or they intend to rob. It's an extremely dangerous situation. It is on the rise in this community. There is no question about that. The defendant had been engaged in this conduct. It was an intentional and knowing act that he did this. All of those lead me to the conclusion that there really no alternative.
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> . . . . I'm sorry. You are going to the Department of Corrections because that is the only appropriate punishment for this offense. So that would be my judgment.

ANALYSIS

The defendant's sole issue on appeal is whether the trial court erred in denying alternative sentencing and imposing full confinement. Specifically, the defendant contends that the trial court improperly considered unreliable, unqualified, hearsay testimony by Sergeant Chestnut regarding drug-related homicide statistics not relevant to the offenses he committed. The defendant "submits that the repeated and unreliable testimony regarding murders involving drugs, prejudiced the mind of the sentencing court" and was insufficient to support a sentence of continuous confinement. The defendant also submits that the court ignored the mitigating proof associated with his rehabilitation potential and instead focused on the potential dangers inherent in the drug-related robbery.

When an accused challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Generally, considerations relevant to determining a defendant's eligibility for alternative sentencing are relevant to determining suitability for probation. *See Ashby*, 823 S.W.2d at 169. A defendant is eligible for probation if the actual sentence imposed is ten years or less and the offense for which the defendant is sentenced is not specifically excluded by statute. Tenn. Code Ann. § 40-35-303(a). Also, a defendant is presumed to be a favorable candidate for alternative sentencing if the defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony and there exists no evidence to the contrary. *Id.* § 40-35-102(6). However, this presumption is unavailable to a defendant who commits the most severe offenses, has a criminal history showing clear disregard for the laws and morals of society, and has failed past efforts at rehabilitation. *Id.* § 40-35-102(5); *State v. Fields*, 40 S.W.3d 435, 440 (Tenn. 2001).

A trial court shall automatically consider probation as a sentencing alternative for eligible defendants. Tenn. Code Ann. § 40-35-303(b). A trial court must also presume favorable candidacy for alternative sentencing unless it is presented with evidence sufficient to overcome this presumption. *See Ashby*, 823 S.W.2d at 169. The presumption in favor of alternative sentencing may be overcome by facts contained in the pre-sentence report, evidence presented by the state, the testimony of the accused or a defense witness, or any other source, provided it is made part of the record. *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). Also, entitlement to probation is not automatic and the defendant still bears the burden of proving suitability for full probation. Tenn. Code Ann. § 40-35-303(b), Sentencing Commission Comments; *see State v. Davis*, 940 S.W.2d 558, 559 (Tenn. 1997). Among the factors applicable to a probation consideration are the circumstances of the offense, the defendant's criminal record, social history and present condition, and the deterrent effect upon and best interests of the defendant and the public. *See State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978).

Guidance as to whether the trial court should grant alternative sentencing or incarcerate is found in Tennessee Code Annotated section 40-35-103. Sentences involving confinement should be based upon the following considerations:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
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> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1)(A)-(C). As part of its determination, the trial court may also consider the defendant's potential or lack of potential for rehabilitation. *Id.* § 40-35-103(5). There is no mathematical equation to be utilized in determining sentencing alternatives. Not only should the sentence fit the offense, but it should fit the offender as well. *Id.* § 40-35-103(2); *State v. Boggs*, 932 S.W.2d 467, 476-77 (Tenn. Crim. App. 1996).

We first address the defendant's contention that the trial court improperly based its sentencing determination on inadmissible hearsay evidence of drug-related homicide statistics. A trial court has statutory authority to admit and consider trustworthy and probative evidence, including hearsay, for sentencing purposes. *See* Tenn. Code Ann. § 40-35-209(b). However, to be admissible, the hearsay evidence must be reliable, and the party opposing its admission must be accorded a fair opportunity to rebut the evidence. *Id.*; *see also State v. Moss*, 13 S.W.3d 374, 385 (Tenn. Crim. App. 1999); *State v. Taylor*, 744 S.W.2d 919, 921 (Tenn. Crim. App. 1987). The record reflects that Sergeant Chestnut's testimony regarding drug-related homicide statistics was based on hearsay and not first-hand knowledge. Also, the statistical information provided by Sergeant Chestnut was not authenticated by any source reliable enough to support its accuracy. Furthermore, Sergeant Chestnut's conclusions about the loss of drug informants derived from his factual assumptions about drug-related homicide statistics are speculative and not materially relevant to the crimes the defendant actually committed. The defendant committed a drug-related robbery and car-jacking, but he was not involved in any drug-related homicide. Although the defendant had the burden of establishing his eligibility for probation under all the fact-based criteria in the statute, he was not required to disprove allegations grounded on hearsay and based on questionable factual assumptions of other crimes he did not commit. To assume otherwise, injects hypothetical extraneous considerations into the sentencing process and contradicts the policy of individualizing sentences that are tailored to fit the offender. *See* Tenn. Code Ann. § 40-35-103, - 210. As such, the evidence pertaining to drug-related homicides in Nashville was highly unreliable and the trial court erred in admitting that evidence for sentencing purposes. We now determine whether or not the court predicated its denial of alternative sentencing on the unreliable hearsay evidence.

From the record, we glean that the trial court based its denial of alternative sentencing primarily on the need for deterrence and the seriousness of the offense. *See id.* § 40-35-103(1)(B). Regarding the court's consideration of deterrence, we note this ground requires there be evidence contained in the record that "would enable a reasonable person to conclude that (1) deterrence is needed in the community, jurisdiction, or state; and (2) the defendant's incarceration may rationally serve as a deterrent to others similarly situated and likely to commit similar crimes." *State v. Hooper*, 29 S.W.3d 1, 13 (Tenn. 2000); *see also State v. Trotter*, 201 S.W.3d 651, 656 (Tenn. 2006). Here, the court found that "it is clear that drug-related homicides are on the rise, that people who go to do drug crimes are armed to the teeth because they've either been robbed themselves or they intend to rob. It's an extremely dangerous situation. It is on the rise in this community." In this instance, the trial court predicated its deterrence findings on the unreliable hearsay evidence of drug-related homicides in Nashville. Also, the court's conclusions about the increasing number of drug-related homicides in Nashville does not relate to the crimes to which the defendant participated – i.e., drug-related aggravated robbery and car-jacking. To reiterate, a sentencing court must find *inter alia* that the "defendant's incarceration may rationally serve as a deterrent to others similarly situated and likely to commit similar crimes." *Hooper*, 29 S.W.3d at 13. Accordingly, given the lack of reliable, probative evidence to support a need for deterrence in this particular case, we conclude that the court erred in denying alternative sentencing based on a need for deterrence. *See Ashby*, 823 S.W.2d at 170 (stating that a court's finding of deterrence cannot be conclusory but must be supported by proof).

However, the trial court also based its denial of alternative sentencing on the need to avoid depreciating the seriousness of the offense. If the seriousness of the offense forms the basis for the denial of alternative sentencing, "the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree,' and the nature of the offense must outweigh all factors favoring a sentence other than confinement." *State v. Grissom*, 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997) (internal quotations omitted); *see also State v. Hartley,* 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991). Here, the court found that the robbery of the drug informant at gunpoint was dangerous in that the robbery could have resulted in the killing of the informant. It appears from the record that the trial court's findings regarding the seriousness of the offense was not so much influenced by the unreliable hearsay evidence of drug-related homicides as the circumstances surrounding the robbery and car-jacking. We concur with these findings and likewise conclude that the defendant's criminal behavior was sufficiently excessive and outweighed all positive factors favoring an alternative sentence. Therefore, the court did not err in denying alternative sentencing based on the seriousness of the offense.

Furthermore, the record supports the trial court's finding that measures less restrictive than confinement have been frequently applied unsuccessfully to the defendant. The record reflects that probation was frequently applied unsuccessfully to the defendant when he was a juvenile. Accordingly, the trial court could properly deny alternative sentencing on this basis.

CONCLUSION

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

J.C. McLIN, JUDGE